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Supreme Court, U.S.
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NO. 95-699

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

DIETER H.M. TROSTER,
Petitioner

v.

PENNSYLVANIA STATE DEPARTMENT OF CORRECTIONS, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Pennsylvania Department of Corrections violates the First Amendment rights of prison guards not to engage in state-compelled expression by requiring them to wear uniforms which include an American flag patch?

2. Whether the Court of Appeals correctly held that petitioner's "symbolic protest" claim is essentially duplicative of his "compelled expression" claim?

LIST OF PARTIES

The parties listed in the petition for certiorari are accurate, except that respondent Joseph D. Lehman, the Commissioner of the Pennsylvania Department of Corrections, has been succeeded in that office by Martin F. Horn, who should be substituted for him. *See* Sup. Ct. R. 35.3.

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STATEMENT OF THE CASE

This case arises out of the denial of a request by the petitioner, a state prison guard, for a preliminary injunction to enjoin the respondents, the Pennsylvania Department of Corrections ("Department") and two of its officials, from disciplining him for his refusal to comply with a departmental regulation requiring all corrections officers to wear an American flag patch on their uniforms. The Court of Appeals agreed with the District Court that, on the specific facts of this case--at least as they had been established at this early stage--preliminary injunctive relief was not warranted as to petitioner's two claims under the First and Fourteenth Amendments: 1) that the mandatory wearing of a flag patch amounted to impermissible "compelled expression;" and 2) that his refusal to wear the flag was protected speech in that it was a "symbolic protest." Pet. App. at 4a-5a.

1. In 1991, at the request of the union representing its prison guards, the Department adopted a regulation which permitted officers to wear an American flag patch on their uniforms if they wished. (*Id.* at 6a). When the Department revised all of its uniform regulations two years later, in February 1993, display of a flag patch on all officers' uniforms became mandatory. (*Ibid.*)[1] Under both regulations, the patch was to be worn in the same manner: on

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[1]Petitioner repeatedly implies that this regulation was enacted as a statement of support for the 1991 Persian Gulf War. Pet. at i, 6, 12 and 15. That is not true and there is no basis in the record for such assertion. Neither the District Court nor the Court of Appeals made any reference to that military action in their opinions , and there was no finding of fact that the challenged regulation, promulgated *two years later*, was in any way motivated by that war.

the uniform shirt's right sleeve with the star field in the upper left corner of the patch oriented toward the rear. (*Ibid.*) The Department's uniform regulations, including the one regarding the flag patch, were adopted for the purpose of fostering the image of a professional corrections force, something important to the overall operation and security of its prisons. (*Id.* at 6a-7a). Display of the flag patch fosters loyalty and obedience to superior officers and signifies that the wearer is authorized to exercise the lawful powers of his position. (*Ibid.*)

Petitioner refused to comply with the Department's flag patch regulation. (*Id.* at 7a). He believes that the required wearing of the flag desecrates and debases it. To him, the mandatory display is "deeply objectionable not only because of his conviction that the American flag symbolizes freedom from state-coerced political or patriotic speech, but also because, in his view, displaying the flag with its star field to the rear signifies cowardice and retreat from the principles for which the flag stands." (*Ibid.*)

2. When the Department attempted to discipline petitioner for refusing to comply with its regulation, he brought this action and applied for a preliminary injunction. (*Ibid.*) After an evidentiary hearing, the District Court found that there was

> no particularized message in the [Department's] uniform flag patch requirement and the viewer will not perceive the wearing of the American flag patch on a corrections' officer's uniform as an improper display of the flag or desecration of the flag . . . Nor will the viewer receive the message that [petitioner] is being compelled to express a viewpoint contrary to his own, or any viewpoint for that

matter. To the contrary, *there is no evidence in the record that an observer will understand the flag patch on the sleeve of the uniform to say anything at all* about the wearer's views.

(*Id.* at 550) (emphasis added). Absent evidence of any discernible--let alone particularized--message, the District Court concluded that petitioner had failed to meet his burden of showing a substantial likelihood of success on the merits of his claims and denied his motion. (*Id.* at 57a-58a).

3. While petitioner's ensuing appeal to the Third Circuit was pending, this Court decided *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct. 2238 (1995), and the Court of Appeals re-examined the evidence before the District Court in line with the analysis required by that case. It concluded that, even without the need to establish the communication of some 'particularized message,' as its prior case law had required, *see, e.g., Steirer by Steirer v. Bethlehem Area School District*, 987 F.2d 989 (3d Cir. 1993), petitioner still had "not at this time met his burden," (*id.* 19a). Since the wearing of the flag patch here was found by the District Court to convey *no* message of any kind--a finding that was "sufficiently supported by the current record," (*ibid.*)--the Court of Appeals concluded that petitioner had "not made the necessary threshold showing that he was (probably) coerced to engage in expressive conduct." (*Ibid.*)

Again stressing that its ruling was based, in critical part, on the record of this case, the Court of Appeals held that petitioner could not maintain his "symbolic protest" claim. "[U]nder the particular facts of this case," the Third Circuit said, petitioner had "not stated an analytically independent

claim of constitutional violation." (*Id.* at 5a). It reasoned that

> [o]ne who violates a governmental compulsion to speak or engage in expressive conduct merely to express opposition to that compulsion on 'compelled expression' grounds engages in no independently constitutionally protected conduct. In such a case the appropriate rubric for a First Amendment claim is simply 'compelled expression' . . . .

(*Id.* at 5a). Any "symbolic protest' claim in such circumstances,the Court of Appeals observed, is "essentially duplicative" (*id.* at 23a), and as a practical matter, cannot succeed where "the root expressive conduct claim failed." (*Id.* at 24a, n. 7). It therefore only addressed petitioner's "compelled expression" claim, (*id.*) and found it lacking on the existing record. (*Ibid.*)

REASONS FOR DENYING THE WRIT

I. THE VALIDITY OF THE FLAG PATCH REGULATION IS A FACT-INTENSIVE INQUIRY WHICH THE COURT OF APPEALS CORRECTLY RESOLVED IN ACCORDANCE WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

The petitioner says that his "compelled expression" claim--his claim that the flag patch regulation forces him to engage in state-coerced speech--presents an important First Amendment claim on which the Courts of Appeals are in disarray, and on which further guidance from the Court is needed. Pet. 11-17. He is mistaken.

A. There Is No Conflict Among the Courts of Appeals.

The Court of Appeals correctly pointed out that not every act constitutes expressive conduct which falls under the protection--or, as here, the restrictions--of the First Amendment. Pet. App. 19a, 21a-23a, *citing Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 576 (1991)(Scalia, J., concurring); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). As the Court has said, not even every action involving the flag is "automatically ... expressive." *Texas v. Johnson*, 491 U.S. 397, 405 (1989). Rather, "characterizing such action for First Amendment purposes" is a fact-intensive inquiry, highly dependent "on the context in which [the action] occurred." *Ibid. See also Connick v. Myers*, 461 U.S. 138, 147-48 (1982)(protected status of public employee's speech to be

determined "by the content, form and context ... as revealed by the whole record").

The petitioner claims that the Court of Appeals' decision in this case conflicts with that of the Eleventh Circuit in *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983), and of the Eighth Circuit in *Dunn v. Carroll*, 40 F.3d 287 (8th Cir. 1994), but this is not so. In both *Leonard* and *Dunn*, as here, each court properly examined the conduct at issue in light of all the surrounding facts; and while the facts--and therefore the results--varied, there is no difference in principle among the courts of appeals.

Leonard involved a group of black police officers who simultaneously removed the flag patches from their uniforms as part of a public demonstration protesting perceived racial discrimination in the police department, *id.*, 705 F.2d at 1300-01; while in *Dunn*, a fire department employee added a flag patch to his uniform as a comment on the then-current situation in the Persian Gulf, where the United States was preparing for the attack on Iraq which occurred in January of 1991. *Id.*, 40 F.3d at 291. In both cases, the court held that this conduct constituted protected speech.

In this case, however, there is no evidence that the flag patch regulation was intended, or was perceived, as "making some sort of ... point." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct. 2338, 2345 (1995). The petitioner simply

> presented the district court with no evidence ... suggesting that anyone ... would be likely to view the wearing of the patch as communicative or expressive, or that people who wear such uniforms with such flag patches actually assert anything to anyone.

Pet. App. 18a. The Court of Appeals thus correctly held that the flag patch regulation does not constitute expressive conduct, but also stressed that its holding was based on the facts, as they now stand, of this case, which is still in its preliminary stages. Pet. App. 4a-5a, 13a, 18a-21a. This approach is completely in accord with both *Leonard* and *Dunn*, as well as with the decisions of the Court.

The petitioner, straining to manufacture a conflict where none exists, repeatedly implies that the flag patch regulation, like the conduct in *Dunn*, was adopted as an expression of support for the 1991 Persian Gulf War. Pet. i, 6, 12, 15. As we pointed out above, at p. 2, n. 1, this is not so. The flag patch regulation, and petitioner's opposition to it, date not from 1991 but from 1993, Pet. App. 6a-7a, 37a; and there is no suggestion from either of the courts below that the regulation, or petitioner's opposition to it, is in any way connected to the Persian Gulf War. *See* Pet. App. 40a (discussing "sole[]" reason for petitioner's opposition).

Petitioner's "conflict" among the courts of appeals is thus illusory. The Court of Appeals resolved this case by properly applying well-established principles of law; and while the petitioner may disagree with the outcome, this alone does not justify review by the Court.

B. *There Is No Reason for the Court to Revisit Its Decision in* Hurley.

Petitioner, however, says that the Court should take this case in order to revisit its decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, supra*. Pet. 13-17. According to the petitioner, the Court's rationale in *Hurley* is essentially without content, Pet. 14 (characterizing *Hurley* as "[d]efining 'communication' as something that has sufficient elements of communication"),

leaving lower courts and the public without guidance in attempting to "gauge the expressiveness of conduct." *Ibid.*

Hurley, however, is, as of this writing, less than six months old, and it is surely premature to conclude that it is "unsound in principle [or] unworkable in practice," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985). To date, the only case to apply *Hurley* in this context has been this one,[2] and the Court of Appeals expressed no difficulty in doing so. *Cf. Planned Parenthood v. Casey*, 947 F.2d 682, 698 n.14 (3d Cir. 1991)(subsequent history omitted)(comparing the task of applying the Court's abortion precedents to "read[ing] ... tea leaves"). If the Court is ultimately to revisit *Hurley*, the issue will certainly benefit from further seasoning in the lower courts.

II. THE COURT OF APPEALS CORRECTLY DISPOSED OF PETITIONER'S "SYMBOLIC PROTEST" THEORY AS DUPLICATIVE OF HIS "COMPELLED SPEECH" THEORY.

The Court of Appeals, having rejected petitioner's "compelled speech" theory, likewise rejected the theory that his refusal to wear the flag patch is a "symbolic protest" independently entitled to First Amendment protection. Pet. App. 20a-33a. The Court of Appeals' "narrow conclusion," Pet. App. 20a, was that, under the circumstances of this case, the petitioner's symbolic protest theory is not "analytically

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[2]In addition, three district court decisions cite *Hurley*, but in other contexts. *See Pro v. Donatucci*, No. 94-6001 (E.D. Pa., Sept. 18, 1995) [1995 Westlaw 552980](First Amendment protects conduct as well as speech); *Schwitzgebel v. City of Strongsville*, 898 F.Supp. 1208, 1218 (N.D. Ohio 1995)(significance of alternative channels of communication); *Elzie v. Aspin*, 897 F.Supp. 1, 5 (D.D.C. 1995)(self-identification of sexual orientation may contain specific message).

independent" of his compelled speech theory, but rather is "wholly derivative," Pet. App. 27a, and "essentially duplicative," Pet. App. 23a, of it.

The Court of Appeals could conceive of no circumstances in which the petitioner's symbolic protest theory could succeed once his compelled speech theory had failed. Pet. App. 24a, n. The petitioner has not attempted to rebut this point, and the Court should decline to consider a theoretical issue which can have no practical impact on the outcome of this case.

CONCLUSION

For these reasons, the respondents ask the Court to deny the writ of certiorari.

Respectfully submitted,

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